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20 Attorneys for Plaintiffs

21
22 UNITED STATES DISTRICT COURT
23
24 EASTERN DISTRICT OF CALIFORNIA

25 PIERRE KORY, M.D., BRYAN TYSON,
26 M.D., LETRINH HOANG, D.O.,
27 PHYSICIANS FOR INFORMED CONSENT,
28 a not-for-profit corporation, and
29 CHILDREN'S HEALTH DEFENSE, a not-
30 for-profit corporation,

31 Plaintiffs,

32 v.

33 ROB BONTA, in his official capacity as
34 Attorney General of California, REJI
35 VARGHESE, in his official capacity as
36 Executive Director of the Medical Board of
37 California, ERIKA CALDERON, in her
38 official capacity as Executive Officer of the
39 Osteopathic Medical Board of California,

40 Defendants.

41 Case No:

42 COMPLAINT

1 Plaintiffs by their undersigned counsel, hereby allege against the Defendants as follows:
2

3 1. This is a 42 U.S.C. section 1983 civil rights action for which this Court has
4 jurisdiction under 28 U.S.C. section 1331. This Court has authority to grant the requested
5 injunctive relief under 28 U.S.C. section 1343; the requested declaratory relief under 28 U.S.C.
6 sections 2201 and 2202; and costs and attorneys' fees under 42 U.S.C. section 1988 (b).

7 2. Venue is proper in the federal Eastern District of California pursuant to 28
8 U.S.C. section 1391 (b). Defendant ROB BONTA, the California Attorney General, has his
9 principal office in this District, as does REJI VARGHESE, the Executive Director of the
10 Medical Board of California, and ERICA CALDERON, the Executive Director of the
11 Osteopathic Medical Board of California (both boards are referred to herein as "Boards").
12 Enforcement of the challenged actions by the individual Defendants in their official capacity
13 takes place in this district.

14

15 INTRODUCTION

16 3. This is a follow-up action involving the parties in *Hoang v. Bonta* currently
17 pending before the Hon. William B. Shubb. *Hoang*, and its related case *Hoeg v. Newsom*,
18 challenged AB 2098 enacted as Business and Professions Code section 2270, effective January
19 1, 2023, enjoined January 23, 2023, and repealed January 1, 2024. The law had granted the
20 California medical boards the specific statutory authority to sanction physicians for providing
21 information, recommendations, and advice to their patients which the boards considered to be
22 "Covid misinformation" as defined in the repealed statute.

23 4. Despite its repeal, the Medical Board of California (hereinafter the "Medical
24 Board") is still targeting "Covid misinformation", and physicians are still being intimidated
25 and threatened by disciplinary action. The only difference is that now the investigations and
26 public threats are based on the general standard of care statute. The Medical Board continues to
27 ally itself with, and adopt the recommendations of, the Federation of State Medical Boards (the
28 "Federation"), which calls for its member medical boards to prosecute physicians for "Covid

1 misinformation.”¹

2 5. Plaintiffs expect the Defendants to make the same argument they made in *Hoang*
3 and *Hoeg* (and the two other AB 2098 lawsuits), namely that all communications between a
4 doctor and patient are part of patient/medical care, and hence unprotected by the First
5 Amendment under the so-called professional speech exception.

6 6. However, the professional speech exception was specifically rejected by the
7 Supreme Court in *Nat'l Inst. Advocates & Life Advocates v. Becerra* (“*NIFLA*”) 138 S. Ct.
8 2361, 2371-2373 (2018) which involved the previous unsuccessful effort by the California
9 Legislature to impose government control over health care professionals’ protected speech.
10 And in so doing, the *NIFLA* court also rejected by name (*Pickup v Brown*) an earlier Ninth
11 Circuit decision upholding yet another California Legislature’s restriction on the protected
12 speech by health care professionals.

13 7. In rejecting these two prior restrictions to physician speech, the Supreme Court
14 forcefully decried California (and other states) attempts to circumvent free speech protections
15 of licensed professionals by the illegitimate transformation/recharacterization of all speech by
16 a professional to a patient/client into unprotected professional conduct. *NIFLA*, 138 S. Ct. at
17 2371-73.

18 8. Despite *NIFLA*’s clear statement to the state governments that they could not
19 unprotect protected speech by its wholesale transmutation into conduct (i.e., patient/medical
20 care), California passed AB 2098. And how did that work out?

21 9. We are now faced with the fourth time California is attempting to regulate
22 protected speech by calling it conduct supposedly regulatable under standard of care authority.
23

24 1 ¹ See, e.g., Stacy Weiner, *Is spreading medical misinformation a physician’s free speech*
25 *right? It’s complicated*, AAMC.ORG (Dec. 26, 2023), <https://www.aamc.org/news/spreading-medical-misinformation-physician-s-free-speech-right-it-s-complicated>; *Enforcement Monitor Final Report Findings and Recommendations*, For Department of Consumer Affairs, MEDICAL BOARD OF CALIFORNIA (Aug. 18, 2023), <https://www.mbc.ca.gov/Download/Reports/enforcement-report-final-2023.pdf>; *Manual of Model Disciplinary Orders and Disciplinary Guidelines*, State of California, MEDICAL BOARD OF CALIFORNIA (12th Ed. 2016), <https://www.mbc.ca.gov/Download/Documents/disciplinary-guidelines.pdf>.

10. When does it end? Plaintiffs ask the Court to send a clear message to the Defendants that the government does not get to “manipulate the content of doctor-patient discourse...” (*NIFLA*, 138 S. Ct. at 2374) by censoring and sanctioning physicians for providing information and expressing opinions that the government does not want patients to hear. Such government overreach is common in the world’s most repressive regimes, but should not be countenanced here.²

11. From the pandemic's beginning, the public health authorities have continuously apologized to the public for its erratic and oftentimes contradictory edicts about masking, the use of ventilators, the wishful thinking, if not fraudulent edicts about the ability of the vaccines to prevent infection and transmission.³ Slowly, the public and the courts are starting to recognize that the primary purveyors of Covid misinformation are the public health authorities and their enforcers like the Defendants, not the physicians who challenge these irrational, magical thinking, and often short-lived edicts.

12. It has been four years since the start of the pandemic, and nine months after President Biden said the pandemic is over. If not now, when does California's pandemic generated attack on physicians' First Amendment rights end?

THE PLAINTIFFS AND THEIR STANDING

13. Plaintiff Pierre Kory, MD is a critical care doctor and a co-founder and president of the Front Line COVID-19 Critical Care Alliance (“FLCCC”), an organization which, *inter alia* advocates for the use of Ivermectin as a treatment for the virus.

14. He is a co-author of several peer reviewed articles on Ivermectin⁴ and he has written a book aptly titled *The War on Ivermectin* which is a detailed description about how

² See *NIFLA*, 138 S. Ct. at 2374, quoting *Wollschlaeger v. Governor*, 848 F.3d 1293, 1325 (11th Cir. 2017) (en banc), (W. Pryor, J. concurring).

³ See footnote 12 on page 19 for references to some of these apologies.

⁴ See, e.g., *Review Of The Emerging Evidence Demonstrating The Efficacy Of Ivermectin In The Prophylaxis And Treatment Of Covid-19*, AM. J. THER, 2021 May-June 28(3): E299-E318, <https://www.ncbi.nlm.nih.gov/pmc/articles/pmc8088823/>.

1 those in power and authority have engaged in a campaign of disparagement against Ivermectin
2 and personally attack pioneers like him who advocate for its use.^{5,6}

3 24 Dr. Kory and his fellow FLCCC members have successfully treated over 5,000
4 Covid patients with the drug. The medical authorities consider all these successfully treated
5 patients to be merely anecdotal evidence. However, the patients and their family members
6 would either disagree, or else do not care and are grateful that there are physicians brave
7 enough to stand up and do what they in their experience think is the best treatment. Dr. Kory
8 laments that somehow the clinical experience of scores of doctors who have treated many
9 thousands of patients has been disvalued.

10 25. Dr. Kory has testified twice before congressional committees, as well as state
11 Legislatures in Pennsylvania, Maryland, and Wisconsin. He is one of the country's leading
12 advocates for the off-label use of Ivermectin.

13 26. Dr. Kory provided important evidence in *Stock v. Gray*, No. 2:22-CV-04104-
14 DGK, 2023 U.S. Dist. LEXIS 48300, at *8-9, *23-24 (W.D. Mo. Mar. 22, 2023), where the
15 district court granted a preliminary injunction against a Covid misinformation statute in
16 Missouri, and pointed out that:

17 Numerous lawmakers also endorsed Dr. Kory's testimony and promoted
18 ivermectin as a COVID-19 drug.... The Court concludes Stock is likely to
19 demonstrate that the statute is unconstitutional. Because Stock has demonstrated a
likelihood of success on her First Amendment claim, the other requirements for

20 ⁵ Like all wars where medical mavericks take on the so called "contemporary scientific
21 consensus," there are attacks against the maverick doctors and this is no exception. Recently,
22 the private internal medicine board ("ABIM") removed Dr. Kory and two other physicians'
23 board certification for spreading Covid "misinformation," but of course a private organization
24 has no obligation to comply with the First Amendment. In addition, he and other authors of a
25 published article were forced to retract a publication (not the one cited above). That all comes
26 with the turf of fighting the medical establishment, sometimes known as the church of medical
orthodoxy. *See Galileo's Lawyer*, Richard Jaffe, 2008, Chapters 1-9.

27 ⁶ There are now 99 published studies from around the world, many of which are fully
28 controlled, which demonstrate the benefit of the drug for Covid. A list of these publications
can be found at <https://c19ivm.org/>. A systematic review of the flaws of the studies which have
not demonstrated efficacy can be found at such reputable source, and see the article referenced
in footnote 4 above.

1 obtaining a preliminary injunction are deemed satisfied. *Rodgers*, 942 F.3d at 456.
2 Conclusion. For the reasons discussed above, Plaintiff's motion for a preliminary
3 injunction is GRANTED. Defendants are prohibited from reviewing,
4 investigating, prosecuting, adjudicating, or enforcing violations of the second
sentence of Missouri Revised Statute § 338.055.7 until after a final order is
entered.

5
6 27. Dr. Kory has a telehealth medical practice providing information and advising
7 patients and maintains a California license, and consults with California based patients.

8 28. As a leading expert on Ivermectin, Dr. Kory's consulting medical practice
9 includes dealing with patients with questions and concerns about Ivermectin, and whether he
10 recommends its use.

11 29. He of course explains that the drug is FDA approved, but not specifically for
12 Covid, and hence would only be available off label. He informs patients that there are some
13 published studies and meta studies showing that the drug is not effective for Covid, but also
14 explains that currently there are 99 controlled studies, both observational and randomized from
15 around the world, the summary analysis of which demonstrates a statistically significant
16 efficacy reducing mortality, hospitalization, rates of viral clearance, and rates of clinical
17 recovery. Of note is that the WHO, in their last guideline recommendation, found that
18 ivermectin use led to an 81% reduction in mortality, yet a recommendation for use was never
19 issued. He disagrees with this decision, for obvious reasons. His patients understand that the
20 FDA, the manufacturer, and all mainstream medical associations recommend against the use of
21 the drug for Covid, but patients consult with him specifically to obtain his perspective.

22 30. Dr. Kory has significant and reasonable concerns regarding the statement by AB
23 2098 sponsor Evan Low that despite the repeal, the medical boards will continue to investigate,
24 prosecute, and sanction physicians who depart from the mainstream Covid narrative. See
25 Exhibit A hereto with the statement. Furthermore, there is at least one such medical board
26 prosecution already forcing a physician to surrender her license to the Board. See *In the Matter*
27 *of the Accusation Against: Ana Rebecca Reyna, M.D.*, Medical Board of California
28 (Accusation June 23, 2023; Decision December 21, 2023; Case No. 800-2021-076688),

1 available at <https://www2.mbc.ca.gov/BreezePDL/document.aspx?path=%5cDIDOCS%5c20231222%5cDMRAAAJD2%5c&did=AAAJD231222191633890.DID>.

3 31. Accordingly, Dr. Kory has a direct interest in the subject matter of this lawsuit.
4 His protected speech to his patients is being threatened and chilled, which, upon information
5 and belief, is exactly what Assemblyman Low and others who support the repression of
6 physician speech intend.

7 32. Plaintiff Brian Tyson, M.D. is a board-certified family practitioner who owns an
8 urgent care facility in Southern California. Since the beginning of the pandemic, he has
9 successively treated thousands of Covid patients with a variety of medications, on and off
10 label.

11 33. As part of his practice, he has occasion to inquire about the vaccine status of
12 patients. One specific context is providing physicals for high school and college athletes. Some
13 athletes have reported chest pains, which requires inquiring about vaccine status since known
14 side effects of the Covid vaccines are heart-related issues like myocarditis.

15 34. This inquiry almost always leads to a discussion of the safety and efficacy of the
16 vaccines and whether the reported side effects were caused by the vaccine. Dr. Tyson provides
17 information and his opinions based on his research, which is not the same as the CDC's
18 position that these side effects are exceedingly rare. Dr. Tyson's opinion is in part based on the
19 thousands of vaccinated patients he has seen since the start of the pandemic and the dozens of
20 patients who have first experienced chest pains after receiving one or more Covid shots. More
21 disturbingly, most of the patients reporting chest pains have had the original shots plus at least
22 one booster.

23 35. Once a patient reports chest pains (whether temporally associated with the Covid
24 vaccine), Dr. Tyson refers the student athlete to a cardiologist and will not clear the student to
25 play sports unless or until the cardiologist signs off.

26 36. Dr. Tyson's discussion with these patients may implicate or trigger a medical
27 board's investigation and prosecution since he is not providing the CDC and FDA's mantra
28 that vaccines are completely safe and cardiac side effects are exceedingly rare.

1 37. Another type of patient interaction which may trigger an investigation is when
2 treating Covid patients who are fully vaccinated and boosted (and most of his Covid patients
3 are in this category), he is frequently asked whether they should keep getting boosted. Since he
4 is now an urgent care doctor and not a PCP (primary care physician), he has the status not to
5 answer the question and can refer the patient to his/her PCP. He does this out of an abundance
6 of caution to avoid problems with the medical board.

7 38. Dr. Tyson was previously investigated for over a year by the medical board for
8 allegedly spreading Covid “misinformation” to the public, but that investigation was
9 terminated earlier in 2023 without any disciplinary action taken.

10 39. Based on the above, Dr. Tyson has a reasonable and grounded fear that his
11 protected speech to patients might subject him to further board investigation and possible
12 prosecution. As indicated, his protected speech is being chilled by the medical board’s conduct.

13 40. Plaintiff Le Trinh Hoang, is a pediatric osteopathic physician. Dr. Hoang has an
14 office in Los Angeles County. She had been licensed by the Board for more than twenty-five
15 years and treats children and sees adults for osteopathic muscular treatments.

16 41. Her practice includes advising her patients (and their families) about the risk
17 versus benefits of Covid vaccines and boosters, based on the patient’s age, health status, and
18 co-morbidities. The level of detail or granularity of the information she conveys to patients
19 depends on the patient (or the family member in the case of young children) and can range
20 from just the broad strokes to discussion of the latest literature on vaccines and the reported
21 deficits in the science behind FDA approved or Emergency Use Authorization (“EUA”) drugs.

22 42. Of course, her patients are informed of the exact FDA status of the vaccine or
23 drug (in the case of Covid treatment drugs) and the government’s recommendation. Dr. Hoang
24 would like to provide information to her male patients between ages 17-39 of the increased
25 risks of cardiomyopathy and other cardiac serious adverse events of the mRNA shots to this
26 patient subset. This information is evidence based and widely reported in the medical

1 literature.⁷ It may not be consistent with the U.S. infectious disease consensus, but the
 2 increased risk is plainly evidence based. Here again, the level of detail would depend on
 3 physician judgment and experience with the patient. Assuming Plaintiff Hoang provides this
 4 important information (in whatever the level of detail) to a patient and recommends against the
 5 vaccine for such a patient, Dr. Hoang believes she may be prosecuted for a standard of care
 6 violation for her fully protected speech based on AB 2098's bill sponsor statements and the
 7 fact that the medical board has prosecuted and disciplined one physician for information and
 8 opinions shared with a patient.

9 43. Sometimes, her patients ask her to comment on the general reliability of the
 10 CDC's edicts and the fact that the edicts seem to change so frequently and sometimes in a
 11 contradictory fashion.

12 44. Here again, Dr. Hoang would like to continue to provide such truthful
 13 information and evidence-based advice to her patients, but since this information and advice
 14 could be targeted as a violation of the standard of care, she is reluctant to do so unless this
 15 Court enjoins the Boards from using prosecutorial power to chill free speech.

16 45. As of the date of the filing of this Amended Complaint, Plaintiff Hoang intends
 17 to provide her patients with the best available information concerning the safety and efficacy of
 18 vaccines and Covid treatments, even where such information and recommendations might fall
 19 within her board's view that it violates the standard of care.

20 40. Plaintiff Physicians for Informed Consent (PIC) is a 501(c)(3) not-for-profit
 21 corporation based in California whose mission is, *inter alia*, to advocate for the right of
 22 physicians to provide true and evidence-based information to patients concerning the risks and
 23 benefits of vaccines. Many of its members are physicians, other health care professionals, and
 24

25 ⁷ See, e.g., Oster et al., *Myocarditis Cases Reported After mRNA-Based COVID-19*
 26 *Vaccination in the US From December 2020 to August 2021* that found the risk of
 27 myocarditis after receiving mRNA-based COVID-19 vaccines was increased across multiple
 28 age and sex strata and was highest after the second vaccination dose in adolescent males and
 young men. 2021. *JAMA*. 2022;327(4):331–340. doi:10.1001/jama.2021.24110,
<https://pubmed.ncbi.nlm.nih.gov/35076665/>.

1 scientists who publish and speak about vaccine safety and efficacy issues.

2 41. PIC is deeply involved in identifying, collecting, and analyzing the evolving
3 *worldwide* scientific literature on vaccine safety and efficacy. It writes up summaries of these
4 studies and disseminates this information to physicians, so that they can provide their patients
5 with the best available information selected from the United States and throughout the world.

6 42. The scientific evidence collected and distributed by PIC is sometimes at odds
7 with what is at any given time the view of the U.S. health authorities and what may be the U.S.
8 scientific consensus. However, such information is based on the best available worldwide
9 evidence. And frequently, PIC's written summaries have foreshadowed changes subsequently
10 made to the mainstream scientific consensus.

11 43. PIC also supports the rights of its members to advise about and prescribe the off-
12 label use of drugs such as Ivermectin and HCQ in the treatment of Covid-19. PIC provides its
13 physician members with information about the hundreds of studies (as of the date of this
14 Complaint) which support the use of these drugs, and encourages its physician members to
15 discuss these studies (and the studies which do not show a benefit) with their patients.
16 However, PIC's physician members are uncertain whether providing patients with studies
17 which have found a benefit would violate the Board's stated position that it can still discipline
18 physicians for Covid "misinformation" despite the repeal of Business and Professions Code
19 section 2270.

20 44. Some patients ask PIC physician members specifically whether there are any
21 studies which support the use of Ivermectin. Arguably, responding to this question truthfully
22 could be considered spreading Covid misinformation to the patient, but responding in the
23 negative would be false. Some physicians respond by advising patients that in fact there are
24 many such studies, but those studies receive limited or no recognition within certain medical
25 communities for many different reasons, and the only studies the FDA currently recognizes for
26 purposes of standard of care are those studies which have not found a benefit. Would
27 conveying this information be sanctionable under the Boards' interpretations of the law? Any
28 answer would be arbitrary and untethered to principle.

1 45. Because the Board still maintains that it has the right to discipline physicians in
2 violation of their (and their patients') constitutional rights, many of PIC's physician members
3 are faced with choosing between providing accurate and complete information about the risks
4 of the vaccine and the different Covid treatments, putting them at risk of Board investigation
5 and discipline, or reciting the latest FDA and CDC-promulgated edict. Or they can choose to
6 keep silent and refuse to answer questions about the latest Covid booster and Covid treatments.
7 This choice is a necessary but completely intolerable result of the Board's pronouncements and
8 actions. Indeed, primary care physicians like Plaintiff Hoang (a PIC member) are especially
9 pincered under Business and Professions Code section 2234 (the very statute the Boards claim
10 as authority over misinformation), because primary care physicians are routinely expected to
11 *answer* patient inquiries and not deflect. Not only deflection but also hesitation to candidly
12 answer can and does injure the doctor-patient relationship.

13 46. Moreover, due to the Boards' broad power to investigate physicians, many of
14 PIC's physician members are afraid of speaking out in public or even to publicly support this
15 case for fear of triggering a Covid misinformation investigation. Accordingly, the Boards'
16 position on providing information contrary to the government's edicts has a chilling effect of
17 PIC physicians' free speech rights.

18 47. PIC's physician members in California who wish to disseminate information to
19 their patients, like the information which the two individual Plaintiffs seek to disseminate,
20 would have standing to participate in this action.

21 48. PIC's physician rights it seeks to assert in this case are germane to and go to the
22 very heart of the organization's educational purpose "to deliver data on infectious diseases and
23 vaccines."

24 49. Neither the claims asserted herein nor the relief requested require the
25 participation of PIC's individual member physicians in this lawsuit. Accordingly, PIC has
26 associational standing to protect the constitutional rights of its physician members in
27 California.

28 50. In addition, the foregoing paragraphs regarding PIC can also be said for PIC's

1 lay members in California who wish to receive the information which is or could be deemed
2 disciplinable conduct. There is an obvious stigma and intimidation upon patients if their
3 medical records are subpoenaed by the medical board, and the patients are then called as
4 witnesses to remember what their doctor told them about Ivermectin studies a year or two
5 years earlier. History has shown a healthy doctor-patient relationship needs the First
6 Amendment. Many of PIC's lay members would like to be able to candidly receive
7 information about off-label drugs for Covid-19 if they contract the virus. Therefore, PIC has
8 associational standing to sue on behalf of its lay members in California on the claims for relief
9 in this case.

10 51. Plaintiff Children's Health Defense is a 501(c)(3) non-profit corporation whose
11 mission is to end childhood health epidemics by working aggressively to eliminate harmful
12 exposures, hold those responsible accountable, and to establish safeguards to prevent future
13 harm. Its mission also includes advocating for medical freedom, bodily autonomy, and an
14 individual's right to receive the best information available based on a physician's best
15 judgment.

16 52. CHD educates and advocates concerning the negative risk-benefit profile of the
17 Covid shots for healthy children, and concerns such as these have caused some of the countries
18 (which have had the best pandemic response outcomes) to stop recommending Covid
19 vaccination or boosters, or both, for healthy children (see recent recommendations of
20 Denmark, Sweden, the UK, and the European Medicines Agency).

21 53. CHD members include numerous California physicians who wish to provide
22 information about the latest studies about the Covid booster shots, as well as information about
23 the off-label treatments for Covid. California parents who are CHD members want to receive
24 objective, non-coerced information from California physicians about the risk profile of the
25 Covid vaccines for the current boosters.

26 54. However, the Board's statements that it will take action against physicians for
27 providing information and opinions challenging the mainstream Covid narrative will have a
28 chilling effect and will dissuade many physicians from providing their candid opinions, which

1 creates a risk of self-censorship significantly impairing the ability of CHD physicians to
2 provide such information, which will militate against CHD lay members in California from
3 receiving such nonconforming opinions from their physicians. An actual and justiciable
4 controversy exists therefore between Plaintiff CHD and Defendants.

5 55. Plaintiff CHD sues in its own capacity and on behalf of its constituent members
6 in California who have been and will continue to be adversely affected by Defendants' actions.

7 56. CHD members would have been able to sue. The interests which CHD seeks to
8 protect are germane to and go to the heart of CHD's purpose. Neither the claims asserted nor
9 the relief requested requires the participation of CHD's individual members in this lawsuit.

10 57. None of the individual plaintiffs are currently the subject of investigation or
11 prosecution by the Defendants. To the best of the organizational plaintiffs' knowledge and
12 belief, none of their California physician members are subject to investigation or prosecution
13 by the Defendants.

14 **THE DEFENDANTS**

15 33. Defendant ROB BONTA is the California Attorney General and is thus the
16 ultimate decisionmaker in the Attorney General's office who enforces the laws of the State of
17 California, including Business and Professions Code section 2234, the general statutory
18 standard of care statute. He is a defendant in his official capacity only.

19 34. Upon information and belief, the Attorney General's office represents the two
20 medical boards in administrative actions against its licensees, including participating in initial
21 interviews with the licensees in the investigation phase of board proceedings, preparing
22 accusations against the licensees and acting as the prosecutor in disciplinary actions.
23 Accordingly, Defendant Bonta has the authority to stop the Attorney General's office from
24 preparing and filing accusations against the Boards' licensees, if this Court grants the relief
25 requested.

26 35. Defendant REJI VARGHESE is the executive director of the Medical Board of
27 California. He is a defendant in this case in his official capacity only for the requested
28 declaratory and injunctive relief.

36. Upon information and belief, Defendant VARGHESE is the final decision-maker on the Board's decision to investigate physicians for violations for providing Covid misinformation, or at least he supervises the subordinate Board employee(s) who make such decisions.

37. Upon information and belief, Defendant VARGHESE has the authority to implement a preliminary and permanent injunction stopping the Board from investigating and filing charges against a medical doctor for an alleged standard of care violation based on the licensee's exercising his/her protected speech rights to patients on the subject (content) about Covid and which does not conform with the CDC's narrative, to wit, the viewpoint of the speech.

38. Defendant ERIKA CALDERON is the executive director of the Osteopathic Medical Board of California. She is a defendant in this case in her official capacity for the requested declaratory and injunctive relief.

39. Upon information and belief, Defendant CALDERON is the final decisionmaker on the Osteopathic Board's decision to investigate physicians for providing so-called Covid misinformation to patients, or at least she supervises the subordinate employee(s) who make such decisions.

40. Upon information and belief, Defendant CALDERON has the authority to implement a preliminary and permanent injunction stopping the Board from investigating and filing charges against a medical doctor for an alleged standard of care violation based on the licensee's exercising his/her protected speech rights to patients on the subject (content) about Covid and which does not conform with the CDC's narrative, to wit, the viewpoint of the speech.

FACTUAL BACKGROUND

The Origins of Nationwide Covid Misinformation Disciplinary Campaign

41. By press release dated July 21, 2021, the Federation of State Medical Boards (the

1 “Federation”⁸) issued the following press release:

2 Physicians who generate and spread COVID-19 vaccine misinformation or
3 disinformation are risking disciplinary action by state medical boards, including
4 the suspension or revocation of their medical license. Due to the specialized
5 knowledge and training, licensed physicians possess a high degree of public trust
6 and therefore have a powerful platform in society, whether they recognize it or
7 not. They also have an ethical and professional responsibility to practice medicine
8 in the best interests of their patients and must share information that is factually,
9 scientifically grounded and consensus driven for the betterment of public health.
Spreading inaccurate COVID-19 vaccine information contradicts that
responsibility, threatens to further erode public trust in the medical profession and
thus puts all patients at risk.

10 *FSMB: Spreading Covid-19 Vaccine Misinformation May Put Medical License At Risk,*

11 FEDERATION OF STATE MEDICAL BOARDS, News Releases (Jul. 29, 2021),

12 <https://www.fsmb.org/advocacy/news-releases/fsmb-spreading-covid-19-vaccine-misinformation-may-put-medical-license-at-risk/>.

14 42. Upon information and belief, Kristina Lawson is or was the Chairman of the
15 Federation’s Ethics Committee, the California medical board’s representative to the
16 Federation, and the President of the Medical Board.

17 43. The following statement by Board President Kristina D. Lawson, appears in the
18 Board’s February 10-11, 2022 meeting minutes:

19 Ms. Lawson stated it is the duty of the board to protect the public from
20 misinformation and disinformation by physicians, noting the increase in the
21 dissemination of healthcare related misinformation and disinformation on social
22 media platforms, in the media, and online, putting patient lives at risk in causing
unnecessary strain on the healthcare system.

23

24

25 ⁸ According to its website, “The Federation of State Medical Boards represents the state
26 medical and osteopathic regulatory boards – commonly referred to as state medical boards –
27 within the United States, its territories and the District of Columbia. It supports its member
28 boards as they fulfill their mandate of protecting the public’s health, safety and welfare
through the proper licensing, disciplining, and regulation of physicians and, in most
jurisdictions, other health care professionals.” *About FSMB*, FEDERATION OF STATE
MEDICAL BOARDS, <https://www.fsmb.org/about-fsmb/>.

1 Ms. Lawson elaborated in July 2021, the Federation of State Medical Boards
2 released a statement saying physicians spreading misinformation or disinformation
3 risk disciplinary action by their state medical board.

4 44. The Federation's press release is listed as a rationale for AB 2098, which was
5 introduced on February 14, 2022. In its original form, the bill tracked the Federation's press
6 release (and Board President Lawson's statement in the minutes) and targeted the public
7 speech of physicians in addition to communications between physicians and patients.⁹

8 45. AB 2098 as amended was passed by the Legislature and signed into law by
9 Governor Newsom September 30, 2022.

10 **AB 2098/Section 2270, Its Injunction and Repeal**

11 46. On January 1. 2023, AB 2098 became effective as Business and Professions
12 Code section 2270, which law implemented the Federation's Covid misinformation press
13 release, limited to communications between doctors and patients "in the form of treatment or
14 advice." Bus. & Prof. Code, § 2270(a)(3).

15 47. The law defined Covid misinformation as "false information that is contradicted
16 by contemporary scientific consensus contrary to the standard of care." *Id.* subparagraph (4).

17 48. On January 23, 2023, the law was preliminarily enjoined on Fifth Amendment
18 grounds by Eastern District Judge William B. Shubb in two related cases, *Hoang v. Bonta*, and
19 *Høeg v. Newsom*, No. 2:22-cv-01980 WBS AC, 652 F.Supp.3d 1172, 2023 WL 414258 (E.D.
20 Cal. Jan. 23, 2023), with respect to three of the five Plaintiffs and two of the three defendants
21 in this case.¹⁰

22 49. In September, 2023, the Legislature added a provision to SB 815 which would
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25 ⁹ AB 2098 references the Federation's July 2021 press release as justification for the bill.
26 *California Legislative Information*, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2098#99INT, Section 1 (f).

27 ¹⁰ Two other cases were filed against the law. In *McDonald v. Lawson*, a Central District
28 judge denied a similar preliminary injunction motion which decision is currently *sub judicata*
before the Ninth Circuit, together with the fourth case. *McDonald v. Lawson*, Nos. 22-56220,
23-55069, 2023 U.S. App. LEXIS 27561 (9th Cir. Oct. 17, 2023).

1 repeal Section 2270 as of January 1, 2024. On September 30, 2023, the Governor signed SB
2 815.

3 **Statements and Actions by the Medical Board and AB 2098's Sponsor**
4 **Demonstrating that the Medical Boards Intend to Continue Violating the Free**
5 **Speech Rights of Physicians**

6 50. News that the California Legislature was repealing Section 2270 was first
7 reported in a Los Angeles Times article on September 11, 2023 (copy attached to this
8 Complaint as Exhibit A).

9 51. The article quoted a spokesman for sponsor Evan Low as saying, "Fortunately,
10 with this update, the Medical Board of California will continue to maintain the authority to
11 hold medical licensees accountable for deviating from the standard of care and misinforming
12 their patients about COVID-19 treatments." Mr. Low's statement is consistent with the
13 Federation's position, which is also the Medical Board's position, that it can discipline
14 physicians for so-called Covid misinformation regardless of the repeal of AB 2098.¹¹

15 52. By December 2023, the Medical Board disciplined at least one physician for
16 information, opinions, and recommendations she made to a patient about the vaccine, including
17 her opinion the vaccine was associated with increases in miscarriages and that the patient's
18 girlfriend should avoid the Covid shot if she wanted to get pregnant; and the physician shared
19 other information about the vaccines and miscarriages. *See ¶ 30, ante* (Accusation, p. 4, ¶ 10,
20 ln. 8 & ¶ 12, lns. 16-19).

21 53. Plaintiffs maintain this kind of information is protected speech. And it is
22 especially noteworthy there was no doctor-patient relationship between the physician and the
23 patient's girlfriend. To be clear, this information would not have been sanctionable under
24 Section 2270 since it was not said to a patient "in the form of treatment or advice." So, the
25 Medical Board is exercising powers it did not even have under the repealed statute.

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27
28¹¹ Accusation referenced in paragraph 30, *ante*; and *see CALIFORNIA REGULATORY LAW*
REPORTER, Vol. 28, No. 2 (Spring 2023),
<https://digital.sandiego.edu/cgi/viewcontent.cgi?article=3149&context=crlr>.

1 54. Other examples of the conduct which the board unconstitutionally contended as
2 disciplinable include opinions that

3 a. masks do not stop the virus (even though recent published studies, including
4 one reported by CNN, indicates the truth of this statement).
5 b. Covid vaccines stop infection and transmission (this too was quickly proven
6 false, as the CDC admitted after many studies proved it; so now the shots are
7 in the category of vaccines that neither prevent infection nor stop
8 transmission).

9 55. The Medical Board also asserts that “all interactions that occur between a doctor
10 and a patient, particularly during a clinic visit must be conducted professionally. There may be
11 no limitation to what topics can be discussed between doctor and patient, but the discussion
12 must remain professional.” *See ¶ 30, ante* (Accusation at p. 5, ¶ 19, lns. 25-28). And thus, the
13 medical board attempts to revive the professional speech exception to free speech which has
14 been expressly rejected by the Supreme Court in *NIFLA*.

15 56. However, all this information and opinion expressed by the doctor and charged
16 in the Accusation involves First Amendment protected speech, according to all judicial
17 authority (other than Judge Slaughter’s opinion).

18 57. Upon information and belief, members and or employees of the Medical Board
19 continue to be in contact with the Federation, and they continue to push the Federation’s
20 agenda set out in its July 2021 press release, despite the clear unconstitutionality of that
21 agenda, a constitutional fact which is known or should be known by the Medical Board’s
22 personnel as well as the Federation.

23 58. The above referenced accusation and decision, together with the AB 2098
24 sponsor’s statement, and the Medical Board’s continued adherence to the Federation’s
25 policy/call-to-arms which created this Covid misinformation board sanctioning idea, clearly
26 establish that the Defendants intend to continue to violate the free speech rights of California
27 physicians.

1 59. These actions send a chill throughout the part of the California medical
 2 community which questions the information put out by the CDC and other parts of the medical
 3 establishment.

4 60. However, the more the public health authorities speak, the more the public loses
 5 faith and trust in the information and recommendations in the public health institutions' Covid
 6 edicts, despite the almost continuous failed results and the repeated empty promises that the
 7 public health authorities will do better.¹²

10 ¹² See, e.g., Nicholas Florko, *Public trust in CDC, Fauci, and other top health officials is evaporating, poll finds*, STATNEWS.COM (Sept. 10, 2020),
 11 <https://www.statnews.com/2020/09/10/trust-cdc-fauci-evaporating/> [Redfield];
 12 Selena Simmons-Duffin, *Poll Finds Public Health Has A Trust Problem*, NPR.ORG, health
 13 (May 13, 2021), <https://www.npr.org/2021/05/13/996331692/poll-finds-public-health-has-a-trust-problem> [Walensky];
 14 *The CDC is beholden to corporations and lost our trust. We need to start our own The People's CDC*, THEGUARDIAN.COM, opinion (Apr. 3, 2022), <https://www.theguardian.com/commentisfree/2022/apr/03/peoples-cdc-covid-guidelines> [Walensky];
 15 *How to Make the CDC Matter Again*, BLOOMBERG.COM, Opinion (May 2, 2022)
 16 <https://www.bloomberg.com/opinion/articles/2022-05-02/the-cdc-needs-reform-to-restore-public-trust-after-covid-19#xj4y7vzkg> [Walensky];
 17 Randy Aldridge, *CDC Announces Sweeping Changes to Restore Public Trust*, NORTH
 18 CAROLINA MEDICAL SOCIETY (Aug. 18, 2022), <https://ncmedsoc.org/cdc-announces-sweeping-changes-to-restore-public-trust> [Walensky];
 19 Tina Reed, *Survey finds concern of political influence leads lack of trust in health agencies*,
 20 AXIOS.COM (May 7, 2023), <https://www.axios.com/2023/03/07/trust-in-cdc-public-health-agencies> ("too many conflicting recommendations"; "Private-sector influence on recommendations and policies" are the second and third most common reasons for lack of trust in the CDC) [Cohen];
 21 NPR one year late, same tune: Sacha Pfeiffer, Megan Lim, Christopher Intagliata, *The new CDC director outlines 3 steps to rebuild trust with the public*, NPR.ORG (Aug. 2, 2023),
 22 <https://www.npr.org/2023/08/02/1191302954/the-new-cdc-director-outlines-3-steps-to-rebuild-trust-with-the-public> [Cohen];
 23 Chelsea Cirruzzo, *The CDC wants your trust back: It'll 'take time to rebuild'*, POLITICO.COM
 24 (Sept. 16, 2023), <https://www.politico.com/news/2023/09/16/cdc-director-public-trust-00116348> [Cohen].

1 61. Upon information and belief, the public's lack of trust is not the result of what
2 critics of the mainstream Covid narrative say in public or to patients. Rather, it is the
3 overpromising of the benefits of the vaccines and every booster, even though they neither
4 prevent infection or transmission, and whatever effectiveness they have is extremely short-
5 lived, a fact which the public health authorities irrationally both downplay and use to justify
6 each successive booster.

7 62. Upon information and belief, between the studies which hint at a direct
8 relationship between repeated boosters and increased risk of infection, excess death statistics
9 which show increased deaths after the Covid vaccines were introduced (based on insurance
10 company data from the United States and England), and the recent concern manifest from
11 preliminary studies that increased Covid vaccinations are or may be associated with super
12 cancers, plus the fact that emails and public testimony from public health officials which show
13 that they have admitted or knowingly misled the public, it is no wonder that a significant
14 percentage of the public does not believe what comes out of the mouths of the public health
15 authorities and their proxies.¹³

16 63. Upon information and belief, there is a disinformation campaign which has
17 affected the public discourse. However, it is being orchestrated by the public health authorities
18 with the help of corporate interests to foist on the public, *inter alia*, a never-ending number of
19 boosters. Part of this disinformation campaign is to silence critics both through the Federation-
20 inspired Covid misinformation laws or standard of care prosecutions. Another part of the
21 overall campaign (though beyond the scope of this lawsuit) are the federal government's direct
22 attempts to force, intimidate or cajole the social media companies to remove content which is
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24

25 ¹³ The individual Plaintiff physicians, the physician members of the two organizational
26 Plaintiffs, and many other physicians have the possibly quaint notion that a physician has a
27 professional obligation/duty of informed consent which would include apprising patients of
28 potential risks (and the risks listed on the vaccines' labels), rather than simply robotically
repeating the public health/standard of care mantra that the Covid shots and every booster have
been proven to be completely safe and effective for everyone including young children and
pregnant women, and everyone (over the age of six months) should take every booster.

1 not consistent with the government's public health narrative. All the time vilifying physicians
2 and others who dare to speak up. This is straight from the Orwellian 1984 government's
3 playbook. Newspeak is now the coin of the realm promoted by the public health authorities and
4 their newspeak co-interlocutors.

5 64. The false and misleading overselling of the safety and efficacy of the Covid
6 vaccines and boosters is most poignantly demonstrated by a recent Elon Musk tweet of a video
7 which is a montage of headlines and public health officials' statements initially making
8 ludicrously false and exaggerated claims, and then having to backtrack, retract and explain
9 away the evidence, all the time insisting that every booster (tested on 8 mice or in one case, 50
10 people over a two-week period of time) is safe and highly effective (because it increased
11 antibodies for as long as two weeks, and that is called a surrogate endpoint), and that everyone
12 over six months of age needs to take every shot and every booster to protect themselves and to
13 protect the public. But the public is not buying it anymore, and the Musk tweeted montage
14 shows why. *See* and view <https://twitter.com/elonmusk/status/1706676593261785178>.

15 65. In times such as these, many people go to their physicians for information,
16 advice, and recommendations about what they should do about Covid, prophylactically and for
17 treatment. And the same will be true for the next pandemic. It is imperative that physicians be
18 permitted to speak their minds without fear of government reprisal. This kind of
19 physician/patient communication is within the heartland of the speech the First Amendment
20 protects. And, that is exactly the subject of this lawsuit, whether the government's assault on
21 this protected speech comes from a specific (and repealed) statute, or the general standard of
22 care provision.

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FIRST CLAIM FOR RELIEF

**42 U.S.C. SECTION 1983 VIOLATION OF THE FREE SPEECH CLAUSE
OF THE FIRST AMENDMENT OF THE UNITED STATES
CONSTITUTION ASSERTED AGAINST THE DEFENDANTS**

66. Plaintiffs repeat and reallege the foregoing allegations.

67. The First Amendment provides in relevant part: "Congress shall make no law... abridging the freedom of speech." The First Amendment applies to actions by state agencies such as the Boards via the Fourteenth Amendment.

68. The individual plaintiffs and the members of organizational Plaintiffs CHD and PIC's physicians have the right to free speech, including the right to freely communicate information to their patients even if the government does not agree with the information conveyed.

69. Furthermore, the patients of the individual Plaintiffs, and CHD's and PIC's non-physician members have the right to receive such information and engage in a genuine free speech dialogue, even if the government does not agree with the information or message conveyed by these physicians.

70. The statements by the individual Plaintiffs and the organizational Plaintiffs constitute a concrete plan to engage in activity, which based on statements and actions by the Defendants and AB 2098's sponsor, strongly suggest that Plaintiffs' speech is within the zone of prosecution under the current policy of prosecuting so-called "Covid misinformation."

71. These same board actions and statements by the Boards' legislative supporters communicated to the California public constitute an intended specific warning or threat to initiate proceedings for the purpose of dissuading physicians from saying anything to patients which is inconsistent with the government messaging concerning, *inter alia*, taking every available Covid booster, and limiting Covid therapeutics to on-label FDA approved drugs.

72. The fact that there is now at least one consummated disciplinary action against a physician for alleged Covid misinformation under the pretext of a standard of care violation, in conjunction with absence of any Medical Board statement that this prosecution is unique, is

1 sufficient for a finding of a prior history of enforcement, in the absence of any evidence to the
2 contrary. Accordingly, Plaintiffs have satisfied the three requisite elements for First
3 Amendment standing. *Høeg v. Newsom*, No. 2:22-cv-01980 WBS AC, 652 F.Supp.3d 1172,
4 2023 WL 414258, page 6-14 (E.D. Cal. Jan. 25, 2023) (Dkt Entry 30 in *Hoang v. Bonta*).
5 Absent injunctive and declaratory relief against Defendants, Plaintiffs will have been and will
6 continue to be harmed in the manner specified herein. Plaintiffs have no plain, speedy, and
7 adequate remedy at law to prevent Defendants from continuing to chill speech and continuing
8 additional prosecutions for so-called Covid misinformation.

9 73. The Medical Board's practice and policy of investigating and sanctioning
10 physicians for their protected speech is a violation of the First Amendment rights of physicians
11 to convey information to patients, and the patients' First Amendment rights to receive such
12 information.

13 74. Further, the anticipated defense that the Defendants have the statutory authority
14 to enforce the standard of care as justification would render the statutes unconstitutionally
15 overbroad.

16 75. Upon information and belief, there can be no clearly defined standard of care
17 during this rapidly evolving pandemic in terms of Covid treatments and recommendations.
18 There are only public health edicts based on the last and usually incomplete and often cherry-
19 picked data, while downplaying or avoiding non-supporting data. The data and edicts change
20 with such rapidity that the standard of care concept becomes distorted and completely
21 inconsistent with the collective experience of front-line physicians treating the disease. As a
22 result, the standard of care does not provide sufficient guidance to justify interference with
23 physicians' protected speech under any form of heightened scrutiny.

24 76. For the foregoing reasons, pursuant to 42 U.S.C section 1983, Plaintiffs request a
25 declaratory judgment that it is a First Amendment violation for the California medical boards
26 to investigate, prosecute or sanction physicians based on information and opinions they
27 provide to patients concerning the safety and efficacy of Covid vaccines, FDA approved drug
28 treatments for Covid whether on or off label, or dietary supplements, or public health measures

1 such as the benefits of masks, at least as long as there is some published scientific evidence
2 supporting the information, opinions, recommendations or advice. Plaintiffs seek preliminary
3 and permanent injunctive relief preventing the commencement of any such investigation or
4 prosecution.

5 77. With respect to recommendations or advice, Plaintiffs seek a declaration that the
6 Boards do not have the First Amendment constitutional authority to investigate, prosecute or
7 sanction physicians for providing such recommendations about Covid vaccines/boosters, or on
8 or off-label FDA approved treatments for Covid, or for any other Covid-related subject, at least
9 so long as there is some published scientific evidence supporting the recommendation or
10 advice. Pursuant to 42 U.S.C. section 1983 and Federal Rules of Civil Procedure, rule 65,
11 Plaintiffs seek preliminary and permanent injunctive relief preventing the commencement of
12 any such investigation or prosecution.

13
14 WHEREFORE the Plaintiffs request that judgment be entered in their favor and against
15 the Defendants as set forth in this First Amended Complaint and specifically that the Court:

- 16 1. Issue a declaratory judgment that it is a First Amendment violation for the
17 Defendants to investigate, prosecute or sanction physicians based on information,
18 opinions, recommendations or advice they provide to patients concerning the safety
19 and efficacy of Covid vaccines, FDA approved drug treatments for Covid whether
20 on or off label, or dietary supplements, or public health measures such as the
21 benefits of masks, based on their statutory authority to enforce the standard of care,
22 so long as there is some published scientific evidence supporting the information,
23 opinions, recommendation or advice.
- 24 2. Issue a preliminary and then permanent injunction enjoining the Defendants from
25 commencing any such investigation or prosecution in violation of the First
26 Amendment rights of physicians and their patients.
- 27 3. Costs and attorneys' fees as permitted by law.
- 28 4. Such other and further relief as the Court deems just and proper.

1 Dated: January 1, 2024

2 Respectfully submitted,

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